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SUBJECT: SUPREME COURT SELECTED, FIRST STEP IN DEMOCRATIC REBUILDING

REF: QUITO 2235

1. (SBU) Summary: Achieving a major democratic milestone and goal of the mission's democracy support strategy (RefTel), on November 28 a new, more independent Supreme Court was named unanimously by the special selection committee, permitting an inauguration ceremony to take place on November 30. The selection of the court came after tense final negotiations and culminates a six-month selection process mandated by Congress after the discredited former court was disbanded in the wake of the irregular change of government in April. The new court will immediately face challenges to its legitimacy, since it was selected by extra-constitutional means. The international community, especially USG-supported OAS monitors, played a critical role which helped the selection commission overcome its differences. The court's first task will be to select a new national judicial council, which in turn will nominate a replacement Constitutional Tribunal. Doing so would fill the current vacuum there and reconstitute a more independent judiciary after almost a year of judicial uncertainty. End Summary.

What Constitution?

2. (U) The Supreme Court and Constitutional Tribunal were dissolved (unconstitutionally) by Congress shortly after the irregular change of government in April. Congress then passed a law mandating a new (extra-constitutional) selection process for the new court. This all came in the wake of an unsuccessful last-ditch attempt by ex-president Lucio Gutierrez to quell street protests leading to his ouster by (unconstitutionally) disbanding the court his allies had (unconstitutionally) packed in December, 2004.

3. (U) Lack of political support for a return to the original (politicized) court caused Congress, the international community (UN Rapporteur for Judicial Affairs, the OAS, the Community of Andean National), and others to support the new selection process imposed by Congress with only minor modifications, despite it being extra-constitutional. The law created a selection committee and included a point system for qualifying candidates. It also mandated that the court's 31 members be apportioned by affiliation (11 to sitting members of the judiciary, 10 to academic legal theorists, and 10 to independent lawyers), but included an exceptional provision (Art. 17) to select the court by simple numerical rank (top 31 of over 100 qualified candidates) in the event of lack of consensus.

Down to the Wire

4. (U) The selection process, while relatively transparent, was not devoid of political pressure. The selection commission president reported receiving threats. On November 24, the commission aborted a scheduled press event to introduce the new court, for lack of consensus over the selection method. Political parties favored respecting the mandate to allocate seats by affiliation, anticipating challenges by a disgruntled judiciary, whose representatives scored poorly on qualifying exams. OAS, UN, CAN and national observers worked feverishly to encourage consensus inside the commission. Time was running out on the process, since by law, nominees needed to disclose their assets before the inauguration ceremony scheduled for November 30. After a readjustment of the rank order of some justices after final reconsideration, consensus was finally achieved late on November 28 and the commission voted unanimously in favor of the application of Article 17, automatically naming the top 31 qualified candidates to the court.

5. (U) Of the 31 selected, only five came from the ranks of the judiciary, 18 hail from academia, and eight came from the ranks of independent lawyers. Three of the justices selected had previously served on the court deposed by Congress in December 2004. Only two of the 31 Supreme Court justices are women.

Comment

16. (SBU) Ecuador's democratic institutions were severely strained by the irregular change of government, undermining confidence in democracy and creating an urgency for repair. Now selected, the new court gains legitimacy benefits from its relatively transparent and independent selection process, but it will face predictable challenges to its legitimacy. To protect against constitutional challenge, some are calling for a popular referendum to ratify the court. Given the current stand-off between the Executive and Congress over the government's proposed referendum, however, it is doubtful the court will be fortified much beyond the inauguration ceremony, to be attended by OAS SecGen Insulza and UN Rapporteur Leandro Despouy. The Charge will represent the Embassy.

17. (SBU) After its inauguration, the court will be severely tested, both by the backlog of high-profile cases (including charges pending against imprisoned ex-president Gutierrez) and the selection of the new national judicial commission. Once the commission helps reconstitute the Constitutional Tribunal, Ecuador will have filled a dangerous vacuum in its judiciary. We believe this overall effort, despite the recourse to extra-constitutional procedures, merits international support.

Suggested Press Guidance

18. (U) We offer the following suggested guidance for press inquiries:

-- We congratulate Ecuador for the re-establishment of the Supreme Court.

-- We were proud to support OAS oversight of the selection process.

-- A well-qualified and independent judiciary is essential for effective democratic governance and economic competitiveness.

-- (If asked) We do not presume to interpret Ecuador's constitution. That is for Ecuadorian institutions to decide.
BROWN